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Nos. 10-196, 10-252

In the Supreme Court of the United States

FRIENDS OF THE EVERGLADES, ET AL.,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DIST., ET AL.,

Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DIST., ET AL.,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT UNITED STATES SUGAR CORPORATION

RICK J. BURGESS
Gunster, Yoakley & Stewart, P.A.
450 East Las Olas Blvd., Suite 1400
Fort Lauderdale, Florida 33301
(954) 468-1362

TIMOTHY S. BISHOP
Counsel of Record
J. BISHOP GREWELL
CHAD M. CLAMAGE
Mayer Brown LLP
71 South Wacker Dr.
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Respondent United States Sugar Corporation

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SUPPLEMENTAL BRIEF FOR RESPONDENT UNITED STATES SUGAR CORPORATION

Every party but the United States agrees that the Eleventh Circuit's decision brings intolerable uncertainty to an issue of immense national importance. Amici, representing a wide variety of stakeholders across the Nation, concur that this Court's review is urgently needed. This Court itself recognized the importance of the issue by granting certiorari in *SFWMD* v. *Miccosukee Tribe*, and by flagging there, but explicitly leaving for another day, the question that this case presents.

The United States does not question the profound importance of the issue to the Nation. It instead offers three reasons why this Court should permit further delay, cost, and uncertainty. Its arguments are wrong and should not discourage the Court from granting review.

1. The United States argues (at 9-13) that the Eleventh Circuit correctly determined that the relevant statutory provisions are ambiguous. Its position is shocking. Dating back to the passage of the Clean Water Act in 1972, the EPA has steadfastly maintained that a Section 402 permit is required "only if the point source itself physically introduces a pollutant into water from the outside world." *Gorsuch*, 693 F.2d at 175; see *id.* at 167 (EPA's interpretation "was made contemporaneously with the passage of the Act, and has been consistently adhered to since").

The Government's new endorsement of ambiguity is flatly contrary to the position it took in *Miccosukee*. As we explained in our earlier brief (at

6-8), the United States there advanced a "straightforward" reading of the Act's "express terms," "text and structure." It did not so much as hint that the CWA might be ambiguous. And the one time it noted that two Circuit Court cases deferred to the EPA's interpretation, it quickly emphasized that those decisions "also follo[w] *based on a straightforward reading of the Clean Water Act's text.*" U.S. Amicus Br., No. 02-626, at 17 n.4 (emphasis added).

The Government's current position is even at odds with its position in the Eleventh Circuit. There, the United States argued that "a straightforward reading of the statute leads to precisely the * * * conclusion" that the "district court erred in concluding that the CWA requires NPDES permits for water transfers." U.S. Br. as Appellant 24.

The Government's startling about-face, which implies it has the power to require NPDES permits for each of the millions of diversions of navigable waters across the Nation, is a major source of uncertainty that justifies this Court's present review.

2. The Government's argument for ambiguity also fails on the merits. The United States now believes (at 10) that "the term 'navigable waters,' in ordinary usage, can refer either to 'individual water bodies' or to 'a collective whole.'" Perhaps that might support ambiguity if "navigable waters" were left undefined, but Congress explicitly defined "navigable waters" as "*the* waters of the United States." CWA § 502(7), 33 U.S.C. § 1362(7) (emphasis added). Only a tortured reading could support a conclusion that Congress meant the "individual water bodies of the waters of the United States" when it defined "navigable waters" as it did. See Br. for U.S. Sugar Corp. at 19-21.

The United States also sees ambiguity in the CWA's use of the phrase "*any* navigable waters" in *other* places. U.S. Br. at 11. But Congress's choice to use the phrase "any navigable waters" in different sections and yet omit the crucial word "any" in the relevant provisions unambiguously supports *respondents'* reading of the statute, for "'Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.'" *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); see *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (use of different terms "only underscores our duty to refrain from reading a phrase into the statute when Congress has left it out").

This bedrock principle of statutory interpretation applies with special force here. As the United States observes (at 11), Congress used the different phrase "*any* navigable waters" in Section 304(f). 33 U.S.C. § 1314(f)(2)(F) (emphasis added). Far from dealing with the Section 402 permitting regime, Section 304(f) addresses "methods to control pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters * * *, including changes caused by the construction of * * * flow diversion facilities." *Ibid.* Section 304(f) fortifies respondents' reading that Congress meant for flow diversion facilities, like the pump stations at issue in this case, to be addressed under *State* nonpoint source programs, not the NPDES regime. See *ibid.* (headed "Identification and evaluation of nonpoint sources of pollution"). Any other reading renders Section 304(f) meaningless.

3. The United States says (at 19-20) that there is no circuit conflict because the decisions in *Dubois*

and *Catskills* that the CWA requires permits for water transfers were issued before EPA's rule took effect. That argument is far too formalistic given the language in the First and Second Circuits' opinions.

In the *Catskills* cases, the Second Circuit required the City of New York to obtain a Section 402 permit for diverting unfiltered drinking water to its millions of residents because the water diversions increase the "turbidity" of a creek frequented by sportfishers. See Br. Amicus Curiae of City of N.Y. In so holding, the Second Circuit rejected EPA's long-standing interpretations of the Act based on what the court considered to be the Act's plain meaning. Applying *Skidmore*, *Catskills I* concluded that EPA's interpretation did not "have the 'power to persuade'" because "the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit." 273 F.3d at 491. "Given the ordinary meaning of the CWA's text," it continued, "we cannot accept * * * a 'singular entity' theory of navigable waters, in which an addition to one water body is deemed an addition to all of the waters of the United States." *Id.* at 493. "Such an interpretation is inconsistent with the ordinary meaning of the word 'addition.'" *Ibid.*; see also *id.* at 494 (describing "what we find to be the plain meaning of [the] text").

Catskills II reaffirmed *Catskills I* after *Miccosukee*. The Second Circuit reiterated that it "do[es] not find the [EPA's] argument persuasive and therefore decline[s] to defer to the EPA." 451 F.3d at 83 n.5. It believed that the City and the EPA "simply overlook [the Act's] plain language." *Id.* at 84. The First Circuit in *Dubois* was just as categorical in

rejecting EPA's interpretation. 102 F.3d at 1296 ("There is no basis in law or fact for the district court's 'singular entity' theory").

Accordingly, the Government's proposed distinction is technically correct, but in practice irrelevant. The First and Second Circuits adopted (erroneous) views of the plain language of the CWA that contradict the Eleventh Circuit's finding of ambiguity, and required permits when the Eleventh Circuit requires none. The conflicting decisions of the Courts of Appeals warrant this Court's intervention.

4. The Government contends (at 20, 21 n.8) that review is not needed because EPA might "reconsider" its current rule and a challenge "as to the permissibility" of a reconsidered rule is "hypothetical." In fact, uncertainty over whether, when, and how the EPA might change its rule only underlines the need for this Court's immediate review.

A new rule would shed no light at all on the question presented, which "rests primarily upon the proper interpretation of a few words of the CWA." Friends Pet. App. 132a-133a. There are only three ways to read the relevant provisions: they unambiguously do not require a Section 402 permit for diversions of navigable waters; they unambiguously do require a Section 402 permit; or they are ambiguous and EPA's interpretation controls. A different EPA rule would not alter those choices. And if the statute is *un*ambiguous, as all parties and amici but the United States contend, then EPA's interpretation has no legal effect anyway. *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'"). There is

nothing "hypothetical" about the inquiry the parties ask this Court to make.

A rule change, on the other hand, is certain to lead to more litigation, with its concomitant costs. EPA's 2008 rule was challenged, including by petitioners in this case, and that challenge remains pending in the Eleventh Circuit. If EPA dramatically reverses course and decides that flow diversion facilities require NPDES permits, then States, cities, companies, and organizations that depend on water transfers will challenge that rule as well. Controversies regarding the proper interpretation of the CWA will not go away simply because the EPA adopts a different interpretation. And while these challenges are ongoing, a subsequent Administration could change the rule again, restarting the endless cycle of litigation.

This case demonstrates the unfortunate delay that any similar controversy must endure. Plaintiffs here filed suit in 2002, the same year that defendants in this case filed a petition for a writ of certiorari in *Miccosukee*. It has taken 8 years for essentially the same controversy between essentially the same parties to be decided by the District Court and Eleventh Circuit before finally returning to this Court. There is every reason to believe that if these petitions are denied, another decade or more of litigation is inevitable.

To understand the tremendous costs of not having a governing nationwide interpretation, one need look no further than *Catskills*. As New York City explains in its amicus brief, in 2000 sportfishing and environmental organizations sued the City for diverting a reservoir through a tunnel and into a creek to bring drinking water to its millions of

residents. Since then, the City has paid over $5.2 million in penalties and hundreds of thousands of dollars in plaintiffs' attorneys' fees and costs, not to mention the costs of its own defense. And after the Second Circuit erroneously required the City to apply for a Section 402 permit, and after the City obtained a permit, the same plaintiffs attacked the permit in state court. The state court found the permit to be defective and ordered the City to reapply for a new permit. The City has done so but expects any new permit to be challenged as well. Even if it obtains a permit, the City will likely violate the permit's terms—because "due to natural conditions, it will never be able to consistently ensure that the diversion has no substantial visible contrast to the receiving waters"—leaving it exposed to further litigation and penalties.

Similar suits could spring up anywhere. See *Gorsuch*, 693 F.2d at 182 (as of 1982, Nation had 2 million dams). Each controversy is enormously costly for defendants, but those litigation costs pale in comparison to a determination that a Section 402 permit is required for transfers of navigable waters. As amici explain, given the characteristics of natural snowmelt, it might be impossible to comply with a Section 402 permit. Br. of Amici Curiae City and County of Denver et al. 14 ("the NPDES approach may not be economically or technically feasible, politically acceptable, or environmentally desirable for many essential water transfers"). If such water transfers are made unlawful, then the viability of the West's great cities is called into question. See Br. of Amici Curiae States of Colorado et al. 3 (mentioning, among others, Denver, Los Angeles, Las Vegas, Phoenix, Salt Lake City, San Diego, San Francisco, and Seattle, all of which depend on water transfers).

Uncertainty and delay also exact tremendous costs on water transfer projects that are yet to be completed. Amici explain that the continued growth of the West and a diminishing supply of water as a result of climate change necessitate "new water transfers to meet demand." Br. of Amici Curiae City and County of Denver et al. 8. There is a tremendous disincentive to build those projects if costs cannot be ascertained. Indeed, as amici point out, the cost of *one* plant to treat natural water flow to comply with NPDES could double the costs of the same project that diverts water across the Continental Divide to roughly one million people. *Id.* at 13. The looming uncertainty over the viability of similar projects across the Nation counsels in favor of, not against, this Court's review.

* * *

The Circuit Courts are divided, EPA has suggested it is rethinking its 38-year-old interpretation, and expensive and protracted litigation shows no signs of abating. All interested stakeholders are left wondering what the law of the Nation is. This Court should grant the petitions for a writ of certiorari now and provide an answer to this fundamentally important question.

CONCLUSION

For the reasons set forth above and in the Brief for Respondent United States Sugar Corporation, certiorari should be granted.

Respectfully submitted.

RICK J. BURGESS
Gunster, Yoakley & Stewart, P.A.
450 East Las Olas Blvd., Suite 1400
Fort Lauderdale, Florida 33301
(954) 468-1362

TIMOTHY S. BISHOP
Counsel of Record
J. BISHOP GREWELL
CHAD M. CLAMAGE
Mayer Brown LLP
71 South Wacker Dr.
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Respondent
United States Sugar Corporation

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